IN THE

Supreme Court of the United States

OCTOBER TERM, 1939

No. 68

WILLIAM HELIS, *Petitioner*,

v.

MRS. ITASCA KINNEY WARD, AS EXECUTRIX OF THE ESTATE OF BRYAN WARD, DECEASED, ET AL., *Respondents*

BRIEF ON BEHALF OF RESPONDENT Y. D. SPELL

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TO THE HONORABLE THE SUPREME COURT OF THE UNITED STATES:

Answering the contention of the petitioner that the Circuit Court of Appeals, in deciding this case, acted upon a theory not tried in the District Court, entitling petitioner to a new trial, respondents show the facts from the record as developed in the trial court in support of the action of the Circuit Court of Appeals as follows:

It was the theory of respondents' case, as shown by their pleading and the unexcluded evidence, that the Bernard Well No. 3 produced an average daily production for a period of fifteen (15) days after its completion of more than three

thousand (3000) barrels a day, calculated on a ⅜-inch choke according to the methods usually employed in gauging the capacity of oil wells.

It was their contention in the trial court that the purchase price of the property was to be determined under the contract by the amount of oil the well was capable of producing in a day, which was to be calculated from the amount that it would produce through a ⅜-inch choke.

The theory of the petitioner in the trial court was that the amount of the purchase price of the property was to be determined by the amount of oil that the Bernard No. 3 well would produce in a day through a ⅜-inch choke. And it was upon this theory of the case that the trial court decided in favor of the petitioner.

It is evident that the only question in the case on appeal was as to whether, under the contract, the price was to be controlled by three eighths (⅜) choke on the production from the well in a day, or its entire production of eight eighths (8/8). In other words, for respondents to recover, was the well to produce more than three thousand (3000) barrels a day under a three eighths (⅜) flow, or a total flow without obstruction?

The amount that the well would produce on a three eighths (⅜") inch flow was to be the known factor by actual measurement, recognized as the unit *from which to compute the amount that the well would produce* by an open flow of eight eighths (8/8), or its entire orifice.

It was a part of the contract as a signed addendum clause (R. 57), as follows:

> "It is agreed by the undersigned that the test provided for in Paragraph 3 of the agreement between them of even date shall be made jointly by one representative of Iberia Oil Corporation and Y. D. Spell and a representative of Wm. Helis; and in the event they fail to agree on the proper gauge on the well or

wells, Judge Hardin of the firm of Pujo, Hardin & Bell will appoint a reputable engineer to act as umpire."

Under this paragraph of the contract W. L. Massey was appointed by Judge Hardin as umpire to determine the capacity of the well. His instruction to Massey, a copy of which was sent to the attorney of respondents, W. N. Bonner of Houston, and the attorney of petitioner, Lloyd J. Cobb of New Orleans, was in part as follows:

"Filed Feb. 26, 1937.
"Pujo, Bell & Hardin,
Lake Charles, La.

"May 3, 1935.

"Mr. W. L. Massie,
c/o Railroad Commission of Texas,
Houston, Texas.

"Dear Sir:

"I have designated you to act as umpire in the test of a certain oil well situated on the Bernard lease in Iberia Parish, in accordance with a contract between Iberia Oil Corporation and Y. D. Spell on the one side and Mr. William Helis on the other. The well is designated as Bernard No. 3. You are requested to determine, first, the actual production of three-eighths (3/8) choke; second, by using the three-eighths (3/8) choke and you are to calculate the open flow capacity of the well" (R. 180).

This letter of instruction was attached *as an exhibit to petitioner's pleading and made a part of the same, and was introduced in evidence by respondents without objection.* Under this instruction Massey, together with another engineer, E. O. Buck, made a report of their tests on the well, in accordance with the instructions. *This full report was attached as an exhibit and made a part of petitioner's petition, and was introduced in evidence by respondents without objection on the part of petitioner.*

The report, consisting of the tests and the calculations made to support the conclusions reached, is found on pages 208-214, inclusive, of the Record. In this report, at page 209 of the Record, it states:

> "Mr. Buck, Mr. Smith, and I conducted various tests on this well, the last of which was Sunday afternoon, and as a result of said tests I find *that said Bernard No. 3 well is capable of flowing merchantable oil at a rate much in excess of 3000 barrels of oil per day on an open flow, or through any choke larger than a 5/8" choke.*"

Also, Mr. E. O. Buck had, previous to that time, on April 29, 1935, made a report of his test of the well. His report and calculation in support thereof is found on pages 204-208 of the Record, and in part was as follows:

> *"The results of the tests are very conclusive that the well is capable of producing considerably more than 3000 barrels per day, and my calculations show that this rate of flow could be obtained on approximately a 5/8" choke"* (R. 205).

This report and calculation in support thereof was *attached as an exhibit to petitioner's pleading and made a part thereof, and was also introduced in evidence by respondents without objection on the part of petitioner.*

This witness E. O. BUCK, testified at the trial as follows:

> By MR. GORDON:
>
> Q. What do you mean by calculating the capacity of the well upon a certain choke?
>
> Objection: MR. COBB:
>
> I think we have already gone over that ground very carefully. I object.
>
> THE COURT:
>
> I think the witness has already explained it.
>
> MR. GORDON:
>
> I would like the answer in for the purpose of my bill.

THE COURT:

All right. Answer the question.

A. Calculation of production would be that amount of oil from the well produced on a certain choke over a given period of time, calculated to represent a 24-hour period.

Q. What would be the total capacity of that well on an open flow without any choke at all calculated on a 3/8th-inch choke?

Objection: MR. COBB:

I object to that question because the witness has already testified what the production of a well calculated on a 3/8th-inch choke was (R. 115).

By MR. GORDON:

"Q. Would that well be more or less than 3,000 barrels calculated on a basis of a 3/8th-inch choke, if there were no choke on the well?

Objection: MR. COBB:

That is the same question in another form.

THE COURT:

I assume so. Answer the question.

"A. The well would produce while I was there in excess of 3,000 barrels, a day, but you have to get a choke larger than 3/8th-inch to do it. It is impossible for oil with that pressure and that type to flow 3,000 barrels with a 3/8th-inch choke. It is physically impossible.

Objection: MR. COBB:

We move to strike the answer of this witness on the ground it is unresponsive, and immaterial to the contract between the parties.

THE COURT:

Overruled. It is not being tried before a jury (R. 116).

The Record shows the following concerning the testimony of this witness:

By MR. GORDON:

From your experience as an engineer which you detailed from the stand, are you able to state whether or not you can calculate the capacity of the oil well that you examined, No. 3, in this record, based upon the 3/8th-inch choke that your first test was made with?

Objection: MR. COBB:

I object to the question on the ground that it elicits, or attempts to elicit from the witness an answer which is irrelevant and immaterial to the issues involved, because the sole question before the court is what the well actually produced calculated on a 3/8th-inch choke for a period of 15 days after completion of the well.

THE COURT:

The court makes this observation. There has been offered in evidence here without objection this witness' report together with a chart amplifying same, showing production of a well on 1/4th choke, 3/8th-inch choke and 1.1/16th as I recall it—

THE WITNESS: Half inch.

THE COURT: Half inch.

THE WITNESS: Calculated then 5/8th-inch.

THE COURT:

And showed the scale and production of each one, and I do not see how the question could add anything to that testimony.

MR. GORDON:

I withdraw my question because I agree with Your Honor it is covered in their report attached to their answer (R. 108-109).

MR. COBB:

I reserve the right to cross-examine the witness" (R. 109).

He subsequently fully cross-examined this witness (R. 110, et seq.).

He further testified:

By JUDGE BONNER:

Q. Did Mr. Helis, or anyone speaking for him, or purporting to speak for him on that lease, ever ask you to do anything in the way of testing and so on that you did not coöperate in doing, and did they ever ask you to come another time, or make any request for coöperation that you did not comply with?

A. No. Nothing occurred on the lease in any way during the three different days that I was there. Mr. Brasher, the first day I met him on the road did not go to the lease. He told Mr. Massie and me that Mr. Smith would be there, and Mr. Smith was at the lease when we got there, and I told him what I wanted to do in the way of testing the well, and he told me to go ahead, but that I could not produce the well on a rate of flow in excess of 3/8th inch choke, and the first day I tested the well was on a flow of 3/8th inch, not larger than 3/8th inch.

Q. Whether he represented Mr. Helis or not, did those men in charge of the lease do what he told them to do, cut this particular well in separate tanks?

A. Yes. sir.

Q. On his request?

A. Yes.

Q. This fellow Smith?

A. Yes, sir.

Q. By the way; I think I asked you this question. When you went back there the first time, did the pressures on the well have a great deal to do with its potential capacity to produce?

A. Yes, sir.

Q. Were the pressures as good at the last as they were in the beginning?

A. The conditions at the well on the 5th day of May were identical, as I could determine from the surface of the ground, as they were on the 27th of April when I was there previously" (R. 118-119).

* * * By JUDGE BONNER:

Mr. Buck, I am not sure this morning that you testified on this point; I want to be sure. In your status and observation and experience, have you ever heard of one well in your life, or seen one, that would produce 3,000 barrels a day *through* a 3/8th inch choke?

Objection: MR. COBB:

I object to the question on the ground that the contract is the law between the parties, and that what this witness may have seen, or what he did not see in the oil industry is incompetent, irrelevant and immaterial, because the issue here is the capacity of the Bernard No. 3 well as fixed by the contract.

THE COURT:

I will permit the witness to answer the question.

A. No, I have never seen a well that would produce 3,000 barrels a day through a 3/8th inch positive choke.

Q. Have you ever read of one or known of one?

A. No, sir.

Q. Now just to gauge a well, just the process of gauging an oil well flowing into a tank, just to tell how much it is making a day, or hour, or week, is that a complicated or simple thing?

Objection: MR. COBB:

I object to that question. The witness has already testified as to the method of calculating the production of a well through any given choke. It is pure repetition.

JUDGE BONNER:

Counsel misunderstood my question I am afraid.

THE COURT:

He stated how it was done. He said at first he would get the measurement from the gauge tank and through the tank table ascertain how much oil there was in there and test that over a period of time and see how much oil there was in the lease or gauge tank.

By JUDGE BONNER:

Q. Is that an engineering problem, or can any school boy do it. Is it a complicated thing?

Objection: MR. COBB:

I object to the question on the ground it calls for the opinion of the witness.

By JUDGE BONNER:

Q. Let me make the question a little more full. Let us assume that the tank on this lease was strapped to begin with; when a tank builder builds a tank he gives you the strapping for it?

A. That is correct.

Q. That is a table which shows you how many barrels of oil are represented by say a foot in the tank, or an inch, something of the kind?

A. Yes, sir.

Q. Let us suppose that this tank was strapped to capacity, that one inch of oil represented 60 barrels, that was your strapping table. Then what would be the process of determining the production that actually went into the tank, no matter what size choke. Would it merely be to take two inches and that be 120 barrels, and so on, just a matter of multiplication; it is a simple process?

A. Yes, it is a simple process" (R. 121-122).

* * * JUDGE BONNER:

The court does not quite understand my point. To make it perfectly clear, if I understand the court, we are all together on it, that this complicated thing, they furnishing a man and we furnishing a man, and an umpire, no such process as that was ever contemplated to gauge a tank. If the Court is in agreement on that I will abandon it, but I want to make it clear on the evidence that just gauging a tank, any 18 year old boy can do.

THE COURT:

I concede that is a question of argument, but I think the facts are fully developed. You have all the latitude you want to bring out the facts bearing on this particular evidence" (R. 123-124).

Counsel for petitioner, as to the reports of Massey and Buck, at the trial announced that they were in evidence as follows:

MR. COBB:

Judge Bonner attempted to show the purpose of the rider attached to the contract of February 6th, which called for the appointment of a petroleum engineer to act as umpire, and a man by the name of Massey was appointed, and the witness Buck concurred in his report. Both those reports are now evidence in this case, because the whole record in this case has been offered by Counsel for the defendant, and I think it quite material and proper to show the official act. Judge Bonner prefaced his remarks this morning that practically this whole transaction was handled by him and me. Frankly, I would have preferred not to introduce this file. It is only in the absence of Judge Hardin and Mr. Massey that I did it. My duty to my client is above my personal desires in the matter, and I have no alternative as I said, *therefore I offered them.*

THE COURT:

In view of the circumstances surrounding the trial I will allow the evidence to go in, though I confess I cannot see the relevancy of them, I will allow them to be offered in order to make up the record so the whole matter will be before the Court, and will reserve Counsel a bill" (R. 134-135).

At page 8 of *petitioner's petition for rehearing in the Circuit Court of Appeals,* he stated:

"The report of Mr. Buck (Tr. p. 204) discloses that he operated the well on a 1/8" choke, a 1/4" choke a 3/8" choke and a 1/2" choke; he ascertained the production and pressure obtained with each choke; and upon the basis of all the figures thus obtained reported:

" 'The results of the tests are very conclusive that the well is capable of producing considerably more than 3000 barrels per day, and my calculations show that this rate of flow could be obtained on approximately a 5/8" choke.' "

None of these facts were presented to Your Honors when you granted this writ.

Summary of the Argument

The substance of petitioner's claim that he is entitled to a new trial, as shown on pages 13 and 14 of his brief, is that reports of the engineers were not in evidence in the trial court. His statement is as follows:

> "The evidence relied upon by the appellate court for rendering judgment herein is the written report of a petroleum engineer (R. 211-14) and a written report of an employee of respondents (R. 204-208). Neither of these reports was offered in evidence upon the trial and they are in the record because constituting exhibits annexed to petitioner's pleading."

These reports were *not only pleaded by petitioner, but conceded at the trial by his counsel to be in evidence, demonstrating that his statement to this Court that they were not, is groundless assumption.*

Facts pleaded by an adversary are established. However, these reports, as admitted by counsel at the trial, were properly in evidence without any objection of any kind or character on the part of petitioner. Moreover, in no wise were these facts disputed or denied. They seem undeniable. They were pleaded below by respondent and not traversed by this petitioner either in the trial or in the appellate court.

The position of petitioner for a new trial is *not that he has not had a trial upon the theory announced by the Circuit Court of Appeals in deciding the case, but that on a new trial on this theory that he will then object to these reports of these engineers and force respondents to place them upon the witness stand,* when he will develop *upon cross-examina-*

tion that the theory upon which the Circuit Court of Appeals decided the case will be destroyed.

His statement to this Court, on page 15 of his brief, is as follows:

> "Furthermore, upon the retrial of this case we would undertake to show that the formula by which Mr. Massey made his calculations and upon which he predicated all of his conclusions is a mathematical absurdity. We venture the statement that Mr. Massey will be compelled to admit on cross-examination either that he has devised a formula unknown to and beyond the comprehension of other and more eminent hydraulic engineers or that his conclusions are predicated far more upon conjecture than upon mathematical calculation."

This is a substantial admission that petitioner has had a trial upon the theory of the case on which the Circuit Court of Appeals decided it, which disposes of the claim against petitioner *that he has not had his day in court under the Fourteenth Amendment* of the National Constitution.

That, on a new trial, if granted, the defendant by objection may exclude evidence that was competent on the first trial, or destroy it by cross-examination of a witness or by the production of the evidence of other witnesses, plainly does not support the claim that on the first trial he was deprived of his day in court on the issue.

It is apparent that the two cases (LUTCHER & MOORE LUMBER COMPANY v. KNIGHT, 217 U.S. 256-267; SAUNDERS v. SHAW, 244 U.S. 317) quoted from by petitioner in his application for the writ of certiorari have no application to the facts of this case.

The case of LUTCHER & MOORE LUMBER COMPANY v. KNIGHT, supra, was where a circuit court of appeals had refused to consider a defense to a suit which was made and developed in the trial court on the ground that such defense

was equitable and not cognizable in a court of law. And since the Circuit Court of Appeals had refused to consider such defense in deciding the case, the Supreme Court granted the writ and remanded the case, not to the trial court where the defense had been developed, but to the Circuit Court of Appeals, requiring that that court rehear and determine such excluded defense.

The case of SAUNDERS v. SHAW, supra, was where the plaintiff sought an injunction against the collection of certain drainage bonds on the ground "that his land was not benefited by the drainage improvement." And the trial court, as against an intervening bond holder, held that this was no defense and denied the plaintiff thereby an opportunity to present his evidence. And the Supreme Court held that this defense to the bond should have been heard by the introduction of evidence and determined by the trial court.

The action of the trial court in that case was as upon demurrer to the pleadings of this defense, depriving the plaintiff of the opportunity thereby to present his evidence in support of his claim.

Conclusion

The record of this case shows that the petitioner was at no time denied the right to controvert, but allowed to stand undisputed the facts adduced on the part of these respondents.

The record shows that he was wrong (as the Circuit Court of Appeals held that he was wrong), in his contention that the well had to produce over 3,000 barrels *through* a 3/8th inch choke. This petitioner throughout the extended litigation in the trial court, and until the decision of the Circuit Court of Appeals, made no question or dispute that this well—one of the largest ever discovered in the Gulf Coast country—was capable of producing oil largely in excess of 3,000 barrels per day. And that was the issue tried and determined upon the record by the district court and the Circuit Court

of Appeals, the only difference and contention being as what was meant by the contract specifying the method calculation of the total capacity of this well.

It is respectfully submitted that the petitioner's couns who saw fit to stand or fall upon his construction of th expression in the contract, with the fullest opportunity combat, if he saw fit to do so, the evidence that this well w capable of producing oil vastly in excess of 3,000 barrels p day, has not had his constitutional rights violated, as he alleged. He had his "day in court" and the Constitution do not guarantee any man that his counsel, with all the privileg of the court open to him, can refuse to produce controverti evidence against his adversaries, relying upon some theo that the respondents' evidence is not legally sufficient, a claim, when he loses, that the Fourteenth Amendment h been violated.

The Fourteenth Amendment, as this Court has frequent said, was never so purposed.

Counsel writing this brief represents the respondent Y. D Spell, and it is intended on behalf of all respondents to sup plement the brief already filed by counsel for responden Ward, et al.

It is most respectfully submitted that the petition w improvidently granted, and it should be dismissed. If this not done, then that this Honorable Court, upon consideratio of the case, should affirm the action of the Circuit Court Appeals.

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